IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA 68/06

In the matter between

JACQUES FRANCOIS SEAWARD **Appellant**

And

SECURICOR SA (PTY)LTD **Respondent**

JUDGMENT

ZONDO JP

<u>Introduction</u>

[1] I have had the benefit of reading the judgment prepared by my Colleague, Patel JA, in this matter. I agree with the conclusion reached by him in his judgment that the reasons for which the appellant was dismissed are reasons which rendered the appellant's dismissal automatically unfair. I also agree with the amount of compensation that Patel JA proposes should be paid to the appellant by the respondent. However, I consider it necessary to write a separate judgment because there is some difference in the approach I adopt and the approach adopted by Patel JA.

[2] The appellant was employed by the respondent, initially as an area manager. Later he was appointed as the Divisional Marketing

Manager: Inland Division. He was dismissed from the respondent's employment on the 6th of April 2004 but his dismissal took effect on the 30th April 2004. He reported to a Mr Andrew Worthington. The respondent is a registered company. The appellant instituted an action in the Labour Court for an order that his dismissal on the 6th of April 2004 by the respondent from the latter's employment with effect from the 30th of April 2004 was automatically unfair and an order that he be paid compensation equal to 24 months remuneration plus costs. As an alternative to an order that his dismissal was automatically unfair, the appellant sought an order that his dismissal was unfair and compensation equal to 12 months remuneration plus costs. That would be applicable if the Court found that the dismissal was not automatically unfair but was nevertheless ordinarily unfair. The respondent defended the action.

[3] The matter came before Pillay J for trial. At the trial the appellant gave evidence in support of his claim. He closed his case without calling any other witness. In this regard it is important to point out that, in addition to the appellant's statement of claim and the respondent's response thereto – which contained certain admissions by the respondent, there was also a pre-trial minute that had been agreed to between the parties. That pre-trial minute contained an extensive record of facts agreed to between the parties as common cause.

[4] After the appellant had closed his case, the respondent closed its case as well without calling any witness to testify in support of its defence. After argument, the Labour Court delivered a judgment in terms of which it dismissed the appellant's claim with costs. The

Court a quo found not only that the appellant's dismissal was not automatically unfair but also that it was not unfair at all and dismissed his claim with costs.

[5] The appellant subsequently brought an application before the Labour Court for leave to appeal to this Court against the whole judgment of the Labour Court. That application was also dismissed. The appellant then petitioned the Judge President of this Court in terms of the Rules of this Court for leave to appeal to this Court. This Court granted the appellant leave to appeal. Pursuant to such order, the appellant now appeals to this Court against the judgment and order of the Labour Court.

The facts

[6] In setting out the facts of this case I shall have regard to a pre-trial minute that was agreed to between the parties, especially with regard to that part thereof in which common cause facts are set out. I shall also have regard to the appellant's evidence. In 2003 certain directors and other employees of the respondent resigned from the respondent's employment and formed an entity called Omega which competed with the respondent. Some of those directors and employees had been friends of the appellant for many years. The appellant did not resign but continued in the respondent's employment. The friendship between the appellant and those directors and employees continued as before. In terms of the pre-trial minute it was common cause between the parties with regard to the appellant and Omega and the latter and the respondent, that:

(a) a hostile relationship existed between Omega and the respondent.

(b) during August 2003 the appellant attended a rugby game at the Securicor Loftus Stadium where the respondent had a hospitality suite and the appellant left the respondent's hospitality suite and went to join his friends from Omega in the Omega suite in the stadium.

(c) Subsequent to the appellant leaving the respondent's suite to join the Omega one, Mr Andrew Worthington, who was the managing director of the respondent's Inland Division and the appellant's immediate superior, had a discussion with the appellant about the incident.

According to the appellant Mr Worthington expressed opposition to the appellant showing his friendship with his Omega friends publicly because Omega was in competition with the respondent. However, Mr Worthington acknowledged that he could not require the appellant to cease his friendship with his Omega friends as they had been friends for a long time. The appellant seems to have understood the concern and the matter was left there.

[7] In February 2004 a certain manager of the respondent who was based in Port Elizabeth was given a notice to attend a disciplinary inquiry in which he was to face certain allegations. The name of that Manager was Mr Ben van Rensburg. Mr van Rensburg was to later ask the appellant to be his representative in the disciplinary inquiry. However, before Mr van Rensburg asked the appellant, the appellant attended a management meeting which Mr Attie van der Merwe also attended. At that meeting Mr van der Merwe

mentioned to those present that he was going to be the chairman of the Van Rensburg disciplinary inquiry. He then made a statement that Mr van Rensburg had been "**naughty**".

[8] In due course Mr van Rensburg telephoned the appellant and asked him to be his representative in his disciplinary inquiry. The appellant agreed to this. When Mr Worthington learn't that the appellant had agreed to represent Mr van Rensburg in the latter's disciplinary inquiry, Mr Worthington approached the appellant to confirm that this was indeed the case. The appellant confirmed to Mr Worthington that this was true.

[9] It is common cause that Mr Worthington spoke to the appellant to dissuade him from representing Mr van Rensburg in the disciplinary proceedings. In his evidence the appellant confirmed what is contained in correspondence written by him subsequently to his seniors that Mr Worthington went further than trying to dissuade him from representing Mr van Rensburg and told him that, if he did so, that would be detrimental to his career. According to the appellant As Mr Worthington did not testify at the trial to contradict the appellant's evidence to this effect, the Court below was bound to decide the matter on the basis that the appellant's evidence that Mr Worthington had made such a statement to him was true.

[10] There can be no doubt that senior management of the respondent not only were not happy with the fact that the appellant had agreed to represent Mr van Rensburg but also they were seriously opposed to it. For a reason that should be apparent later in this judgment, I

consider it important to highlight the fact that the respondent's senior management were opposed to the appellant representing Mr van Rensburg even before the disciplinary inquiry could commence. This is an indication that the respondent's opposition was not just about how the appellant conducted himself in the Van Rensburg disciplinary inquiry but they were opposed to the appellant's mere representation of the appellant. I must also point out that, since the respondent did not call any witnesses to give evidence and provide an explanation or reasons or justification for its stance, the Court below was bound to decide the matter on the basis that there was no reason or basis or justification for the respondent's stance and hostility towards the appellant's decision to represent Mr van Rensburg.

[11] In order to represent Mr van Rensburg in the latter's disciplinary inquiry, which was to be held in Port Elizabeth, the appellant, who was based in Gauteng, had to travel to Port Elizabeth and was going to need accommodation. All of this had financial implications. He wrote to Mr Attie van der Merwe to enquire whether, in terms of the respondent's policy, the respondent would pay for his travelling to and accommodation in, Port Elizabeth. He was asking Mr van der Merwe because Mr van der Merwe was going to chair the disciplinary inquiry and also because Mr van der Merwe was in the Human Resources Department of the respondent. Mr van der Merwe did not respond to the appellant's inquiry. The appellant was aggrieved by this. Ultimately some or other official of the respondent informed the appellant that the respondent's policy did not require the respondent to pay for the appellant's travelling to and accommodation in Port Elizabeth in

this regard. The appellant, nevertheless, did travel to Port Elizabeth and represented the appellant in the disciplinary inquiry and this was not paid for by the respondent.

[12] In the Van Rensburg disciplinary inquiry the appellant raised a number of objections one of which was that Mr Attie van der Merwe should recuse himself from the position of chairman of the inquiry because of the remark he had made at the management meeting to the effect that Mr van Rensburg had been "**naughty**". Mr van der Merwe did not respond to the appellant's application for his recusal and did not even make a ruling on it. He simply ignored it and went ahead with the disciplinary inquiry. Mr van der Merwe found Mr van Rensburg guilty of misconduct and Mr van Rensburg was dismissed.

[13] At the trial the focus of the respondent's Counsel's cross-examination of the appellant with regard to the Van Rensburg inquiry was on the manner in which the appellant went about representing Mr van Rensburg. He asked the appellant questions such as why the appellant's focus in the disciplinary inquiry was on procedural issues and not on substantive issues and why the appellant did not put Mr van Rensburg's version to one or other witness of the respondent.

[14] Subsequent to the conclusion of the Van Rensburg inquiry, the appellant lodged a written grievance with Mr Drake, who was the managing director of the respondent, against Mr Worthington and Mr van der Merwe. The appellant's grievance against Mr Worthington was that Mr Worthington had threatened his career

because of his (i.e. the appellant's) decision to represent Mr van Rensburg in the latter's disciplinary inquiry. The appellant's grievance against Mr van der Merwe was the latter's failure to respond to the appellant's inquiry about the respondent's policy with regard to the payment of his travelling expenses relating to his representation of Mr van Rensburg.

[15] The appellant's grievances against Mr Worthington and Mr van der Merwe were contained in two separate letters bearing the date 25 February 2004. They were both addressed to the same person, namely, Mr Douglas Brake. In his memorandum concerning his grievance against Mr Worthington, the appellant inter alia:

(a) stated that his grievance against Mr Worthington pertained "**to the vindictive and threatening manner in which [Worthington] attempted to convince me not to represent Mr Ben van Rensburg at his disciplinary inquiry.**"

(b) wrote in par 4:

1. **"At approximately 12h00 on 17 February 2004 Andrew Worthington came into my office and told me that he had learnt that I am planning to represent Mr Ben v Rensburg, and that he wishes to warn me against the decision to do as such, because it would be detrimental to my career, and that I would be shooting myself in the foot. His further reasoning was that I was a senior manager in the company and that it was not right for me to represent a person as junior**

> **as a regional manager. I informed him that Ben v Rensburg was a personal friend of mine and that I had made a promise to him to assist him. He also informed me that himself and John Hitchcock had made a decision that neither the Inland or Coastal Divisions would carry the transport and or accommodation costs for me to go to Port Elizabeth."**

(c) wrote in par 5 that on the 19th February 2004 Mr Worthington had called him and in the course of that discussion had again threatened him by saying that it was not a good idea for the appellant to represent Mr van Rensburg and urged him to reconsider.

(d) pointed out that it was not the first time that Mr Worthington had threatened his career as he had done so the previous year, namely; that on the 23rd August 2003 when Mr Worthington had told the appellant that he had no career in the respondent company.

[16] The e-mail containing the appellant's grievance against Mr Attie van der Merwe did not contain much that requires attention. It suffices to say that the appellant's complaint was about Mr van der Merwe's failure to revert to him about what the respondent's policy was on travelling and accommodation costs where one employee travelled to represent another co-employee away in a disciplinary inquiry.

[17] By a letter dated the 4th March 2004 Mr Brake responded to the appellant letters relating to the latter containing grievances against Mr Worthington and Mr van der Merwe. With regard to the appellant's grievance against Mr van der Merwe, Mr Brake failed to address the appellant's complaint which was why Mr van der Merwe had not responded to his request about travelling and accommodation costs. Mr Brake simply told the appellant what the respondent's policy was on such expenses.

[18] With regard to Mr Worthington, Mr Brake said that due to the nature of the allegations against Mr Worthington and in order to give the appellant an opportunity to properly ventilate the issues, "**an investigation/enquiry**" would be conducted by a Mr Eric Louw, a senior commissioner of the Commission for Conciliation, Mediation and Arbitration ("**CCMA**"). Mr Brake said that Mr Worthington was to also be afforded an opportunity to respond to the complaints and allegations and he could also address any complaints that he might have against the appellant. Mr Brake said that, should Mr Worthington have any concerns or complaints against the appellant which he wished to raise in the investigation/ enquiry, he (i.e Mr Brake) would make sure that the appellant was given a brief outline thereof prior to the "**investigation/inquiry**". He pointed out that that inquiry should not be construed as a disciplinary inquiry or grievance hearing but as an opportunity for both parties to ventilate their concerns regarding the allegations made. The chairperson was only to have powers "**to make recommendations to both parties regarding their respective concerns and/or allegations.**" Mr Brake concluded the letter by pointing out that the appellant would be entitled to be

"**assisted/represented at the investigation/inquiry by a co-employee**." The inquiry was scheduled for Wednesday 10 March 2004.

[19] On the 5th March 2004, Mr Attie van der Merwe addressed a letter to Mr Worthington in which he gave Mr Worthington information about what he (ie Mr van der Merwe) believed had been unacceptable behaviour by the appellant in Mr van Rensburg's disciplinary inquiry. The first paragraph of the letter reveals that Worthington had requested this information from Mr van der Merwe. In the letter Mr van der Merwe:

(a) expressed his disapproval of the fact that the appellant, being a senior manger, had represented a junior manager "**in a case where the company lost business to the opposition**" and said that the appellant's decision to represent Mr van Rensburg "**was in totality a conflict of interest**."

(b) stated that **"[the appellant's] action can be seen as insubordination by disobeying a direct order from you [ie Mr Worthington] not to represent the accused**."

(c) expressed the view that the appellant's request for the company to pay his travelling and accommodation expenses in regard to the Van Rensburg inquiry was unreasonable, against company policy and general practice.

(d) stated that the appellant's behaviour throughout the Van Rensburg inquiry was "**unacceptable, rude, disruptive and he had shown no respect for the**

company disciplinary process and the "prosecutor" in the disciplinary inquiry.

(e) accused the appellant of unprofessional conduct and not acting "**in the spirit of the company's disciplinary code and code of good practice**."

(f) accused the appellant of only deciding to represent Mr van Rensburg in the disciplinary inquiry after he, that is Mr van der Merwe, had shared some information in a management meeting.

[20] It is interesting to note that in the second paragraph of his letter of the 5th March 2004 to Mr Worthington, Mr van der Merwe suggested that Mr Worthington had given the appellant an order not to represent Mr van Rensburg in the latter's disciplinary inquiry. This appears in the last sentence of the second paragraph of the letter. The sentence which reads: "**Furthermore [the appellant's action of representing Mr van Rensburg] can be seen as insubordination by <u>disobeying a direct order from you not to represent the accused</u>**." It is unlikely that Mr van der Merwe's source of information that Mr Worthington had given the appellant a direct order not to represent Mr van Rensburg was the appellant. It is more probable that it was Mr Worthington himself who had given Mr van der Merwe that information. It is clear that Mr van der Merwe, too, found the idea that the appellant represented Mr van Rensburg in the disciplinary inquiry unacceptable. In fact he expressly said so in the letter.

[21] In due course the so-called investigation/inquiry that was to be chaired by Mr Louw was convened. Both Mr Worthington and the

appellant took part in the process. The process appears to have taken the format of a conversation between the three, that is the appellant, Mr Worthington and Mr Louw. The discussion seems to have been civil between Mr Worthington and the appellant Mr Louw subsequently prepared a report on the process. In the report he said he would accept "**without deciding that Mr Worthington did address Mr Seaward on 17 and 19 February 2004 in the manner alleged by him**."

[22] In the next few sentences Mr Louw said:

> "**Whilst I have no difficulty with [the] view and stance taken by Mr Worthington, it was certainly not necessary to threaten Mr Seaward's career in any manner or in any words. I can however at the same time not see why Mr Worthington, given the circumstances which prevailed during 2003, and perhaps still to a lesser extent today, and given the alleged Omega connection to the case against Mr van Rensburg, was not at liberty to discuss the matter with Mr Seaward and indeed try and dissuade him from representing Mr van Rensburg. It stands to reason that Mr Seaward's actions may very well once again stir up all the emotions with which the company had to deal since 2003. It is of no moment that Mr van Rensburg requested Mr Seaward to represent him as a result of his belief in the integrity of Mr Seaward. Surely Mr Seaward is not the only person with untarnished integrity within the company unless of course there was something much more to Mr Seaward representing Mr van Rensburg than meets the eye**."

After this paragraph of Mr Louw's report came what seems to be the most critical part of his report with regard to the appellant – a paragraph which seems to reflect his conclusion about what the appellant had done wrong in the saga. In that paragraph Mr Louw said:

> "**I have little doubt that Mr Seaward's decision to represent Mr van Rensburg was and remains a bad idea. The interests of the company and in particular the perception that stood to be created by his decision weighed much more than Mr van Rensburg's right' to be represented by Mr Seaward, and I share the company's sentiments as expressed and conveyed by Mr Worthington**".

Mr Louw's conclusion as contained in the above passage reveals that what he found unacceptable in the appellant's conduct was not what the appellant said or did in the Van Rensburg disciplinary inquiry but the mere fact that the appellant represented van Rensburg in a disciplinary inquiry.

[23] Mr Louw made two recommendations at the end of his report. The one was that Mr Worthington be counselled by the Human Resources Director "**as to the manner and basis upon which to address employees as an endeavour to discuss what he regards as unacceptable conduct or behaviour**" The second was **"(t)hat serious consideration be given to charging Mr Seaward for operational requirements in view of his downright stubborn refusal to place the company's interests as a first priority above those of Mr van Rensburg, and in view of his intolerable (given**

the circumstances) relationship with the management of Omega."

[24] On the 25th March 2004 the appellant was given a notice to attend a disciplinary inquiry on the 30th March 2004. He was suspended pending the disciplinary inquiry. It seems that that notice was signed by a G.E.P Nel as a "**Company representative at disciplinary enquiry/hearing**". It would further appear from the document containing the allegation(s) against the appellant that there were two allegations or charges made against the appellant, one appearing in the first paragraph and the second being the last sentence in the document. The first allegation read thus:

> "**You are charged that over a period of time, since August 2003, you have been engaged in an attitude of defiance, conducted yourself in an obstructive manner and by your misconduct have created a situation which is incompatible with the Company's objectives and interests, and to such extent that the employment relationship between the parties has been rendered intolerable**."

The second one read thus:

> "**It is alleged that you have caused the employment relationship to completely break down and in the result there is a loss of confidence and absence of trust in regard to you**."

It seems to me that there is much overlap between the two allegations.

[25] In support of the first allegation that the appellant was to face in the disciplinary inquiry, the respondent cited nine "**examples**". They were:

"- **Your display of utter display of disloyalty by attending a rugby match at Securicor Loftus in the Omega box, a direct Competitor of Securicor.**

- **Your attempts to discredit fellow managers and directors for example: Andrew Worthington, John Hitchcock, Lee Kingma and Attie van der Merwe.**

- **Your actions that have led to the distrust by fellow managers**

- **Your attempt to paint a picture of constant victimization.**

- **Your unacceptable rude and disruptive tactics during the Van Rensburg disciplinary hearing.**

- **Your disrespect for the company's disciplinary process.**

- **Your words, actions and general behaviour regarding the non-payment of an air ticket.**

- **Your public support for an opposition company with which the Company is presently engaged in litigation.**

- **Your own response that the relationship with the Company is such that it negatively impacts on your health and family life**."

[26] Prior to the commencement of the disciplinary inquiry, the appellant sent an e-mail to Mr Jan Vercueil of the respondent dated 25 March 2009 and requested the respondent to allow him to have what he called "**outside representation**" during the disciplinary inquiry. In support of his request he pointed out that he had "**fruitlessly**" tried to obtain "**representation from within the company without success**." He also referred to the fact that the chairman of the inquiry was going to be someone from outside the company. He also drew attention to the fact that Mr Giep Nel, who was going to represent the company in the disciplinary inquiry, was someone whom he regarded as having "**very good labour knowledge**" and whom he regarded as a "**labour specialist**." He said Mr Nel, who, he said, was a HR practitioner and had drafted the disciplinary code of the company, would have an unfair advantage over him in the disciplinary inquiry. The appellant pointed out that he thought he would be disadvantaged "**when arguing the principles of labour law.**"

[27] The respondent's reply to the appellant's request came on the same day as the day of his request but did not come from Mr Jan Vercueil to whom it had been addressed. It came from Mr G. Nel, the appellant's opponent in the disciplinary inquiry. Mr Nel declined the appellant's request. It is not clear why the respondent left it to Mr Nel, who was to "**prosecute**" the appellant, to decide

the appellant's request instead of it being decided by someone else who could be perceived as more objective than Mr Nel could have been in the circumstances. In his reply Mr Nel inter alia said:

(a) that **"(t)he Disciplinary Code is very clear on representation. You will be allowed one (1) representative from within the Company**."

(b) that he was offering to assist the appellant to obtain a representative from within the company and suggested two names, Annemarie Bodenstein and Franz Verhufen;

(c) **"(t)he company is also prepared, if you send us the names of not more than seven (7) employees to consult with those employees on your behalf**."

(d) that he proposed **"that an outside chairperson be appointed**".

[28] The appellant responded to Mr Nel's letter by an undated memorandum in which he requested a postponement of the disciplinary inquiry which at that stage was set down for the 30th March 2004 because he did not have "**an accurate report of Mr Eric Louw.**" He also made other requests connected with his preparation for the hearing. He said that he would have no objection to an outside chairperson if he was also going to be allowed outside representation. He cited previous cases which he regarded as precedents for outside representation. Two of the paragraphs in the appellant's memorandum deserve to be quoted. They read:

> "**I wish [to] place on record that I have the right to a representative, and in this I believe that I have the right**

> **to choose my own representation. Unfortunately the individuals whom I have requested to represent me have refused due to fear of victimization as I have been victimized for representing Ben van Rensburg. For this reason I also do not even want to divulge the names of those persons I have requested to represent me.**
>
> **The fact that the company wishes to appoint a representative for me, is also unacceptable for many reasons. The mere fact that the individuals proposed are junior managers in the company and even Andrew Worthington stated that Ben van Rensburg was too junior for me to represent, now the company proposes the reverse situation where they wish a junior to represent me**."

The respondent did not allow the appellant to have "**outside representation**".

[29] In due course the disciplinary inquiry was convened in which the appellant faced the allegations of misconduct referred to earlier. The inquiry was chaired by a Mr Coetzee. According to the pre-trial minute the appellant and respondent agreed upon the disciplinary inquiry being chaired by Mr Coetzee.

Mr Coetzee's ruling and the reasons

[30] In his ruling Mr Coetzee said that an employee cannot be punished for merely representing another employee at a disciplinary hearing. He also stated that the Court, by which I assume he was referring

to the Labour Court, had held that shopstewards are entitled to be robust in representing employees in disciplinary hearings. Accordingly, said Mr Coetzee, "**a person cannot be charged per se for having represented an employee at a disciplinary hearing and per se for having acted vigorously and strongly in defence of such an individual and therefore I will not rule on that aspect**."

[31] Mr Coetzee also said that he would not rule on the appellant's statement made "**in terms of the legislation covering the protection services industry**". That meant that he would not entertain a complaint that the appellant's conduct in regard to making that statement constituted misconduct. He said that the appellant was protected by statute. After this part of Mr Coetzee's ruling followed two important paragraphs.

[32] In the first of the two paragraphs Mr Coetzee inter alia said:

(a) that he was left with "**the dominant impression that the case concerned relationships, the relationship between [the appellant] and Omega directors and other personnel who had resigned from the respondent, [the appellant] and his colleagues, [the appellant] and his superiors and ultimately with his employer, the respondent"**.

(b) that the corner stone of the employment relationship is mutual respect "**between employer and employee as well as the subordination, the loyalty and the trust of an employee towards his employer**"

(c) that "**the fundamental cornerstone of [Mr Coetzee's] judgment**" was "**the mutual respect between employer and employee as well as the subordination, the loyalty and the trust of an employee towards his employer**."

(d) that he thought that the problem in the case before him lay in the contamination of the employer and employee relationship.

In the second of the two paragraphs Mr Coetzee inter alia made the following points:-

(a) that communication can destroy a relationship and one should be careful with how one communicates in a relationship

(b) that, if you communicate something wrong to the other person in a relationship, there will be an impact and this is what happened in the case before him.

(c) that the appellant's correspondence in the bundle (which in oral evidence the appellant said referred to his grievance letters or memoranda) had "**reason to be alarmed**".

(d) addressing himself to the appellant, Mr Coetzee also said "**the manner, your tone and your words that you chose when you wrote a letter to Mr Douglas Brake to complain about Mr Giep Nel, your grievance to Mr Douglas Brake about Mr Andrew Worthington, your further grievance once again to Mr Douglas Brake concerning Mr Attie van der Merwe. One cannot use strong language like this and expect it to be seen in a constraint on the**

grievance because these letters are not part of protection. We are not in parliament where you can say what you want and you have some sort of legal privilege. A grievance letter has no protection whatsoever, one can be held accountable for what you say, what you do with your grievance letter. In this case I am alarmed by what I see. I am alarmed by the words you chose when you refer to these people."

(e) that he was also alarmed in the manner in which the appellant had "**dealt with Mr Attie van der Merwe in his evidence**."

(f) that he had to caution the appellant when he dealt with Worthington "**in his evidence, of the hostility**" and that there was a "tremendous amount of hostility that he saw "**from [the appellant] towards**" people like Mr Worthington and Mr van der Merwe but not vice versa.

(g) that the appellant had "**struck out**" at Mr Giep Nel in his heads of argument that he submitted to Mr Coetzee.

(h) that he found a lot of contempt in the appellant's actions against Senior Management which, he said, reflected the appellant's employer, he also said that "**that destroys the very fabric of an employee/employer relationship**."

(i) that he was of the view that "**if one chooses your words carefully, if you really want to resolve a**

> **grievance, you do not attack in the manner in which you attacked these individuals**."

[33] After saying what he said in the two paragraphs, Mr Coetzee said that he "**consequently**" found the appellant "**guilty of an attitude of defiance, obstructive conduct creating incompatibility in the company's objectives and interests and rendering the employment relationship intolerable**." In the next paragraph Mr Coetzee inter alia wrote:

> "**You've clearly decided that your relationship with Mr Ben van Rensburg, which is a secondary relationship, is more important than your primary relationship with Securicor, no doubt that. You've clearly decided that your secondary relationships with past employees of this company is more important than your present relationship with Securicor and as a consequence, I have to dismiss you**."

[34] When one analyses Mr Coetzee's ruling and the reasons for his conclusion and sanction, one finds that Mr Coetzee came to the conclusion that instead of "**contributing**" to the employment relationship that the appellant had with the respondent, the appellant had "**contaminated**" such relationship. See the last sentences of the first of the two paragraphs of Mr Coetzee's ruling quoted above. Mr Coetzee then blamed the appellant for the correspondence that he wrote in regard to his grievances against Mr Attie van der Merwe and Mr Worthington. Mr Coetzee also blamed the appellant for a letter or email that he wrote to Mr Brake. He also criticised the appellant for the contents of his heads

of argument in the disciplinary hearing before him. Mr Coetzee said the heads of argument "**struck at**" Mr Giep Nel. Mr Coetzee also said he found a lot of contempt in the appellant's actions against Senior Management and that senior management represented the appellant's employer.

[35] Mr Coetzee went on to say that there were "**a lot of examples of people that testified**" before him such as Mr Jan Vercueil, Mr Worthington, Mr Nel and Mr Attie van der Merwe. Mr Coetzee said that he was of the view "**that that destroys the very fabric of an employee/employer relationship**." In the next sentence Mr Coetzee said:

> **"I am of the view that, if one chooses your words carefully, if you really want to resolve a grievance, you do not attack in the manner which (sic) you attacked these individuals."**

Judgment of the Labour Court.

[36] Like Mr Louw, the Court below seems to have taken the view that the appellant should not have represented Mr van Rensburg in the latter's disciplinary inquiry. It also seems to have had a problem with his having been robust in his representation of Mr van Rensburg. The Court below stated that the appellant was adversarial in his approach in Mr van Rensburg's disciplinary inquiry. It said that the fifth and sixth objections he raised in Mr van Rensburg's disciplinary inquiry showed that he was not independent and objective. I do not think it is a requirement that an employee's representative in a disciplinary inquiry must be

independent and objective and that, if he is not, he can be charged with misconduct. The Court below also said that those two objections showed that he had "**a personal axe to grind**". The Court below also made the point that none of the objections related to the merits of the allegations.

[37] The Court below also criticised the appellant's cross-examination of the respondent's witnesses in the Van Rensburg inquiry as not having been aimed at "**interrogating the truth of the evidence of the respondent's witnesses but at discrediting their testimony to show that they had their own scores to settle**" with Mr van Rensburg. I do not see anything wrong with a representative of an employee in a disciplinary inquiry cross-examining the employer's witnesses to expose their possible motives for giving certain evidence against the employee. The Court below also criticised the appellant by saying that he did not approach certain evidence "**with a modicum of caution as a manager loyal to the respondent would have done**." That was a reference to evidence that Mr van Rensburg had said that he was thinking of going over to Omega. The Court below said that the appellant dismissed the evidence of those statements as statements made by Mr van Rensburg in frustration and when he had been drinking. I am not sure why it is suggested that the appellant should not have said what he said in this regard if that was Mr van Rensburg's version which the latter gave him.

[38] There are other aspects of the judgment of the Court below which are critical of the appellant but I am of the view that it is not necessary to go into them. It suffices to say that the view I take of

the matter is very different to the view taken by the Court below. The Court a quo found that the appellant had the onus to establish prima facie that he was dismissed for representing Mr van Rensburg and for lodging grievances against Mr Worthington and Mr van der Merwe. The Court said that he failed to establish that the dismissal was unfair. The Court below dismissed the appellant's claim with costs including the costs reserved on 27 February 2006.

The appeal

[39] In considering this appeal certain things must be borne in mind throughout. These are that:

(a) there is a pre-trial minute agreed to between the parties in which is set out a long list of facts agreed to between the parties as common cause; these can and must be taken into account in deciding the appeal; indeed, they should have been taken into account by the Court below as well.

(b) there was only one witness who testified at the trial in this matter; that is the appellant and his evidence is uncontradicted.

(c) the appellant was not shaken under cross-examination and he did not deviate from his evidence-in-chief at all or in any manner materially helpful to the respondent's defence.

(d) Mr Attie van der Merwe, who could have given evidence about whether or not the appellant was rude or in anyway misbehaved during the Van Rensburg

inquiry was in Court when the appellant testified but was not called to contradict or explain any of the things that the appellant testified he said or did; no explanation was given as to why he was not called.

(e) on the last day of the cross-examination of the appellant by the respondent's Counsel, the latter informed the Court that he intended calling only one witness, namely, Mr Worthington with whom he was going to have a consultation either that same day or the following morning but, when the matter was called the following morning and the opportunity arose for him to call Mr Worthington, Counsel for the respondent announced that he was closing the respondent's case; he closed the respondent's case without calling Mr Worthington or Mr van der Merwe or any witness for that matter and proffered no explanation.

(f) the trial in the Court a quo was a hearing *de novo*.

[40] With the above in mind it is appropriate to remember that the appellant's case in the Court below was that the reason why he had been dismissed was that he had represented Mr van Rensburg in the latter's disciplinary inquiry and had lodged grievances against Mr van der Merwe and Mr Worthington. There is no doubt that the appellant not only established a prima facie case that this is why he was dismissed but also he established that this was, indeed, the case. In support of this the following can be referred to:

(1) the appellant's uncontradicted evidence is that some of the respondent's senior management above him

were opposed to him representing Mr van Rensburg in the latter's disciplinary inquiry.

(2) immediately after Mr Worthington had learn't that the appellant was going to represent Mr van Rensburg in the latter's disciplinary inquiry, he went to the appellant and not only tried to dissuade him from doing so but went further and said that it would be detrimental to the appellant's career to represent Mr van Rensburg; indeed, the appellant's uncontradicted evidence was that Mr Worthington said to him that by representing Mr van Rensburg, the appellant would be shooting himself in the foot; the fact that Mr Worthington was not called to contradict this damning evidence against himself and the respondent despite being available to be called as a witness and despite an earlier indication by the respondent's Counsel that he would be called gives rise to an adverse inference that must be drawn against the respondent in this regard. That is that Mr Worthington was not going to contradict that evidence in any effective way.

(3) The appellant lodged a grievance with Mr Douglas Brake against Mr Worthington and the grievance was that Mr Worthington had threatened the appellant's career should the appellant proceed to represent Mr van Rensburg in the latter's disciplinary inquiry.

(4) In his own letter of 5 March 2005 addressed to Mr Worthington, Mr Attie van der Merwe wrote on the basis that Mr Worthington had ordered the appellant not to represent Mr van Rensburg in the disciplinary

inquiry and the appellant had defied that order; no document was discovered by the respondent in which Mr Worthington wrote to Mr van der Merwe to deny that he had ordered the appellant not to represent Mr van Rensburg. Mr van der Merwe described the appellant's conduct in representing Mr van Rensburg as the one that was "**in totality a conflict of interest**."

(5) In his outcome report Mr Louw criticised the appellant's decision to represent Mr van Rensburg; he said that it was a "**bad idea**" and said that "**the interests of the respondent and the perception that stood to be created**" by the appellant's representing Mr van Rensburg "**weighed much more than Mr van Rensburg's right**" to be represented by the appellant. Mr Louw further recommended that "**serious consideration be given to charging [the appellant] for operational requirements in view of his downright stubborn refusal to place the company's interests as a first priority above those of Mr van Rensburg and in view of his intolerable (given the circumstances) relationship with the management of Omega**."

(6) In paragraphs 7.16 and 7.17 of the pre-trial minute it was stated to be common cause that, after Worthington and the appellant had discussed the appellant's decision to represent Mr van Rensburg, the appellant was given "**the opportunity to reconsider his decision**."

(7) In his ruling Mr Coetzee said that an employee cannot be punished for merely representing another employee in a disciplinary hearing. Accordingly, said Mr Coetzee, "**a person cannot be charged per se for having represented an employee at a disciplinary hearing and per se for having acted vigorously and strongly in defence of such an individual and therefore I will not rule on that aspect**."

(8) Mr Coetzee also said that he would not rule on the appellant's statement made "**in terms of the legislation covering the protection services industry**". That meant that he would not entertain a complaint that the appellant's conduct in regard to making that statement constituted misconduct. He said that the appellant was protected by statute.

(9) In his decision Mr Coetzee said a lot about the words the appellant used in the letters he wrote lodging his grievances against Mr van der Merwe and Mr Worthington including how he says the appellant dealt with these two men when they gave their evidence in the disciplinary enquiry. I have carefully read the appellant's letters to Mr Brake which contained the appellant's grievances against Mr van der Merwe and Mr Worthington. I could not find anything in the contents of those letters which was unacceptable or so unacceptable as to justify Mr Coetzee making so much issue about how the appellant chose his words.

(10) After Mr Coetzee had found the appellant guilty of the misconduct, he inter alia said the following in the next paragraph addressing the appellant:

"**You've decided that your relationship with Mr Ben van Rensburg, which is a secondary relationship, is more important than your primary relationship with [the respondent], no, doubt about that. You've clearly decided that your secondary relationships with past employees of this company is more important than your present relationship with Securicor and as a consequence, I have to dismiss you**."

[41] The first of these two sentences quoted from Mr Coetzee's reasons for his decision to dismiss the appellant provides the clearest proof that the appellant's decision to go ahead and represent Mr van Rensburg in the latter's disciplinary inquiry even after Worthington's attempts to stop him from doing so played a critical role in Mr Coetzee's mind in deciding to dismiss the appellant. The only conceivable reason why Mr Coetzee could say that the appellant decided that his relationship with Mr van Rensburg was more important that his relationship with the respondent is that he chose to represent Mr van Rensburg when the Respondent's stance was that he should not do so. Furthermore, this part of Mr Coetzee's ruling must be considered against the background that earlier in his ruling he had said that **"(i)n this particular case, it is the predominant impression that is left with me that the case concerns relationships**." He also said that "**the corner stone of the employment relationship is mutual respect between**

employer and employee as well as subordination, the loyalty and the trust of an employee towards his employer." In the sentence that followed Mr Coetzee then said: "**That is a fundamental cornerstone of this judgment**."

[42] Mr Coetzee said that, when it came to a relationship, there were only two things on could do with it. He said that "**you can either contribute to the relationship or you can contaminate the relationship**." At the end of that paragraph, Mr Coetzee said: "**And this is exactly in this case where we pick up a problem.**" The inference is irresistible that, as far as Mr Coetzee was concerned, the appellant had "**contaminated**" his employment relationship with the respondent by standing for Mr van Rensburg's right to be represented by a co-employee of his choice in his disciplinary inquiry. The respondent led no evidence to justify their opposition to the appellant representing Mr van Rensburg. Accordingly, the matter must be dealt with on the basis that such opposition was without any justification.

[43] From the above I have no hesitation in concluding that the appellant succeeded in showing that his conduct in representing Mr van Rensburg in the latter's disciplinary inquiry was the main or the dominant reason for his dismissal. There is a seamless chain of events which occurred from around the 17th February 2004 to the 6th April 2004 when the appellant was dismissed. These events/incidents were the following:

(a) on the 17th and 19th February Mr Worthington tried to stop the appellant from representing Mr van Rensburg and said that, if the appellant proceeded to represent

Mr van Rensburg, he would be shooting himself in the foot and his career at the respondent would be in jeopardy.

(b) on the 5th March 2004 Mr Attie van der Merwe wrote in his letter to Mr Worthington that the appellant's conduct in representing Mr van Rensburg was a defiance of Mr Worthington's order not to represent Mr van Rensburg.

(c) In the letter referred to in (b) above Mr van der Merwe expressed his own opposition to the appellant's act of representing Mr van Rensburg.

(d) Mr Brake set up an inquiry into the appellant's grievances which was chaired by a senior commissioner of the CCMA.

(e) the senior commissioner of the CCMA expressed his disapproval of the appellant's conduct in having represented Mr van Rensburg and even recommended that the appellant be charged with misconduct in this regard.

(f) the respondent formulated allegations of misconduct against the appellant which included directly or indirectly the respondent's opposition to the appellant representing Mr van Rensburg in the disciplinary inquiry.

(g) in his reasons for his ruling Mr Coetzee, clearly held it against the appellant that the latter had represented Mr van Rensburg; he held this against the appellant despite the fact that he had also earlier said in his ruling that an employee could not be charged with

misconduct for representing a co-employee in a disciplinary inquiry; that Mr Coetzee held this against the appellant is to be gathered from inter alia the fact that he criticised the appellant for what he referred to as the appellant's preference of his "**secondary relationship**" with Mr van Rensburg to his "**primary relationship**" with the respondent.

[44] During the cross-examination of the appellant by Counsel for the respondent, the latter focused not so much on the appellant's decision to represent Mr van Rensburg but on how he chose to handle Mr van Rensburg's case. He criticised the appellant for inter alia focusing on procedure rather than on the merits of the case and for not putting Mr van Rensburg's version to the respondent's witnesses. Counsel must have focused as he did because he realised that he could not criticise the appellant for merely representing Mr van Rensburg in the inquiry. However, it seems to me that an employer has no business telling a representative of an employee in a disciplinary inquiry how best to conduct the employee's case. Provided the representative has not misconducted himself, he has a right to present his "**client's**" case as he sees fit. Although it might be difficult or even undesireable to define when such "**misconduct**" happens, but I have no doubt that he does not misconduct himself by not putting the employee's version to the employer's witnesses nor does he misconduct himself by focusing on procedure. Indeed, he does not misconduct himself by requesting the chairman of the inquiry to recuse himself from the inquiry. If the employer penalises an employee who represents another employee in a disciplinary inquiry because, in representing

his co-employee, the representative focused on procedure or did not put the co- employee's version to the employer's witnesses or because he raised an objection against a certain person chairing the inquiry, that would, in my view, be so intrinsically linked to the employee's right to represent his co-employee that it amounts to penalising such employee for exercising the right to represent his co-employee in a disciplinary inquiry. That is victimisation and would render the dismissal an automatically unfair one.

[45] With regard to whether part of the reason for the appellant's dismissal was that he had lodged grievances against Mr Worthington and Mr van der Merwe, it is clear from Mr Coetzee's reasons for his decision to dismiss the appellant that he held it against the appellant that he had complained in the terms in which he complained against Mr Worthington and Mr van der Merwe. Mr Coetzee did not say that the appellant was wrong to lodge the grievances. Obviously, he could not say that but he criticised the appellant for the manner, the tone and the words he chose to articulate his grievances. I have read the two letters or memoranda which contained the appellant's grievances against Mr Worthington and Mr van der Merwe, there is nothing in the contents thereof that can reasonably be said to have crossed the line of what was acceptable in terms of the manner, the tone and the words chosen by the appellant to articulate his grievances.

[46] For an employer to penalise an employee for articulating his grievances in the manner, tone and the words that the appellant used in the two letters or grievances is to interfere with the employee's right to express his grievances as he sees fit. An

employee does not have the right to go beyond a certain line in articulating his grievances but, if he has not crossed that line, the employer is obliged not to interfere with the employee's right. It may be difficult, or even undesirable to define where that line lies but, wherever it lies, in this case it was not crossed. In the light of all of this it seems to me that there is sufficient evidence to conclude that part of the reason why the appellant was dismissed is that he exercised his right to lodge grievances against the two men and the right to articulate such grievances in his terms.

[47] At some stage during the cross-examination of the appellant by Counsel for the respondent the latter put something to the appellant that reveals beyond any doubt that the respondent's statement that the appellant placed Mr van Rensburg's interests above those of the respondent during his representation of Mr van Rensburg was about what points he pursued in the inquiry and what points he did not pursue. In the relevant part of the record Counsel for the respondent is reflected as having said to the appellant:

> "**My question is that your statement that you will deal with the matter objectively, yesterday, as you said in your evidence is merely a pretence that you in fact laid all the emphasis on procedure when in fact you should have laid the emphasis on the merits and under those circumstances your defence of Mr van Rensburg was of such a nature that it did not take into account the company's interests at all**".

The appellant replied to this by saying that he dealt with the Van Rensburg disciplinary inquiry objectively.

[48] As Mr van Rensburg's representative, the appellant was entitled, as a general rule, to protect Mr van Rensburg's interests and, to that extent, it was no business of the respondent whether in doing so, he was subjective. There may be exceptions to this general rule but I am satisfied that this is not a case where any exception to the general rule applied. For an employer to require a representative of an employee facing a disciplinary inquiry to place the interests of the company above those of the employee he is representing is the worst example of an employer's interference with an employee's right to be represented by a co-employee in a disciplinary inquiry that I have ever come across. That the respondent saw nothing wrong in coming to court to defend the appellant's claim on the bases inter alia that during Mr van Rensburg's disciplinary inquiry the appellant should have placed the respondent's interests above those of Mr van Rensburg whom he had agreed to represent and focused on the merits and not the procedure baffles me.

[49] I understood it to be common cause between the parties' Counsel that, if we found that the appellant was dismissed because he represented Mr van Rensburg and because he lodged grievances against Mr van der Merwe and Mr Worthington, the dismissal would constitute victimization and would be an automatically unfair dismissal. I think that that is correct. However, in any event terms of sec 187(1) if an employer dismisses an employee contrary to sec 5 of the LRA, that dismissal is automatically unfair. Sec 5(2)(iv) of the LRA prohibits anyone from prejudicing an employee for refusing or failing "**to do something that an employer may not lawfully require an employee to do**."

[50] Item 4 of the Code of Good Practice: Dismissal

> Dismissal inter alia provides that in a disciplinary inquiry **"(t)he employee should be entitled to the assistance of a trade union representative or a fellow employee".**

There is no suggestion in item 4 that employees in certain categories should only be entitled to the assistance of employees in certain categories. The preparation, issuing and publication of this Code of Good Practice is authorised by sec 203(1) of the LRA. Sec 203(3) provides that anyone interpreting or applying the LRA must take into account any relevant code of good practice. Sec 203(4) authorises a Code of Good Practice to provide that anyone interpreting or applying any employment law may take it into account. In the light of sec 203(1), (3) and (4) of the LRA the exclusion of the Code of Good Practice: Dismissal from the definition of the words **"this Act"** in sec 213 of the LRA is difficult to understand.

[51] In this case the respondent required the appellant not to represent Mr van Rensburg in the disciplinary inquiry. It had no right to make such a requirement to the appellant. When the appellant did not give in to the appellant's pressure, the respondent dismissed him. The dismissal constituted the prejudice which the respondent visited upon the appellant for not complying with the requirement that he should not represent Mr van Rensburg in the disciplinary inquiry. That rendered the dismissal automatically unfair in terms of sec 187(1) of the LRA in that, in dismissing the appellant, the respondent acted contrary to section 5 of the LRA. Accordingly, the appeal must be upheld.

Relief

[52] The appellant did not seek reinstatement. He sought compensation in an amount equivalent to 24 months remuneration. There was no argument addressed to us that, if we found that an automatically unfair dismissal had been established, we should not order payment of compensation at all nor was argument addressed to us that, if we were inclined to award compensation, it should not be the maximum amount permissible under sec 194 of the LRA fro an automatically unfair dismissal. In these circumstances and in the light of the unacceptable conduct of the respondent it seems to me that the respondent should be ordered to pay the appellant compensation that is equivalent to 24 months' remuneration.

[53] The respondent behaved very badly. It victimised the appellant for representing Mr van Rensburg, a co-employee when he stood to gain nothing from representing him other than to affirm every employee's right to be represented by a co-employee of his choice in a disciplinary inquiry. The appellant's courage to stand by his co-employee and act in accordance with his conviction of what was right even in the face of serious pressure and threats to his employment if he went ahead and represented Mr van Rensburg is to be commended. By taking disciplinary action against the appellant for representing Mr van Rensburg, the respondent sent a very unacceptable message to all its employees; namely; thou shall not represent anyone we do not approve you to represent. If you do, woe unto you! That message is untenable. Indeed, the appellant could not find anybody who was prepared to represent him in his own disciplinary inquiry and he had to represent himself. This

Court can only send a clear and unequivocal message to employers about an employee's right to a representative of his choice among his co-employees if it awards the appellant the maximum compensation permissible in law. It was not argued on behalf of the respondent that, even if we found that the respondent had victimised the appellant and the dismissal was automatically unfair, awarding the maximum compensation allowed by sec 194 of the LRA would be excessive and that in such a case we should award a lesser amount of compensation. Accordingly, I am of the view that it is fair and equitable that the appellant be awarded compensation equivalent to 24 months' remuneration.

[54] With regard to costs I can see no reason why the requirements of the law and fairness would in this case dictate anything other than that the respondent should pay the appellant's costs both in this Court and in the Court below.

[55] In the premises I concur in the order contained in Patel JA's judgment.

Zondo JP

I agree.

Waglay JA

Patel JA

Introduction

[56] The appellant, Jacques Francois Seaward, was formerly employed by Securicor SA (Pty) Ltd ('the Respondent'). The appellant was initially employed by the respondent as an area manager. He was subsequently appointed as respondent's Divisional Marketing Manager: Inland Division, a position which he held until his dismissal. Appellant contended that the termination of his employment constituted an automatically unfair dismissal in terms of s 187 (1) (d) of the Labour Relations Act 66 of 1995 ('the Act'). Upon dismissal the appellant referred the dispute concerning his dismissal to the Commission for Conciliation, Mediation & Arbitration (CCMA). However, the CCMA failed to resolve the dispute within the time period contemplated in the Act, and the dispute was referred to the Labour Court for adjudication.

[57] In the Court *a quo* the gravamen of the appellant's claim was that his dismissal was automatically unfair. The appellant was the only witness who gave evidence. The Respondent closed its case without calling any witnesses. The Labour Court found that the appellant had not "*prima facie*" (sic) established that his dismissal was automatically unfair alternatively unfair. The Court thus dismissed the claim with costs, such costs to include the costs occasioned by an earlier postponement. An application for leave to appeal to this Court was also dismissed with costs. This appeal accordingly serves before us on leave granted by this Court on petition. At the outset it must be emphasised that since the CCMA

did not resolve the dispute, the hearing before the Court below was *de novo* and did not serve before it as a review. Hence the focus on whether the appellant established whether the dismissal was automatically unfair must be determined by the conspectus of the evidence led before the Court *a quo*

Factual background

[58] The respondent is a company which operates nationally and also has reach in certain parts of Africa. It provides security and guarding services to major companies and employs a staff of approximately fifteen thousand employees. The appellant reported to Andrew Worthington ('Worthington'), the Managing Director of the Inland Division of the respondent.

[59] At the outset I deal with charges that the appellant faced in an internal enquiry before I proceed with the further factual background in order to contextualize the factual matrix. The appellant faced the following charges in the internal disciplinary hearing, namely:

> "Over a period of time since August 2003, you have been engaged in an attitude of defiance, conducted yourself in an obstructive manner and by your misconduct have created the situation which is incompatible with the company's objectives and interests and to such an extent that the employment relationship between the parties has been rendered intolerable"

This overall charge was particularised as follows:

"1. Your display of utter disloyalty by attending a rugby match at Securicor Loftus in the Omega box, a direct competitor of Securicor. Your attempts to discredit fellow managers and directors, for example Andrew Worthington, John Hitchcock, Lee Kingsma and Attie van der Merwe;

2. Your actions that have led to the distrust by fellow managers;

3. Your attempts to paint a picture of constant victimisation;

4. Your unacceptable rude and disruptive tactics during the Van Rensburg disciplinary hearing;

5. Your disrespect for the company's disciplinary process;

6. Your words, actions and general behaviour regarding the non-payment of an air ticket;

7. Your public support for an opposition company with which the company is presently engaged in litigation;

8. Your own response that the relationship with the company is such that it negatively impacts on your health and family life; and

9. It is alleged that you have caused the employment relationship to completely break down and in the result there is a loss of confidence and absence of trust in regard to you."

[60] It is common cause that during 2003 some of the respondent's directors and other employees left its employ and established a new company called Omega Risk Solutions ('Omega'). This resulted in a hostile relationship between Omega and the respondent. During August 2003, the appellant had attended a rugby match where respondent has a hospitality suite. However, appellant proceeded to the Omega suite to see some of his former colleagues. This was conveyed to Worthington who later had a discussion about this with the appellant. Appellant was told by Worthington that this was not prudent because of the ongoing hostility between the two companies and requested him not to be seen in public with the Omega staff. The appellant accepted this reproach and gave an assurance that he would not do so in the future. It was common cause that the appellant had friends who had left the respondent and joined Omega. Some of these friendships had endured for a very long period and it was no secret that appellant kept contact with some of them. In any event according to the appellant's evidence this incident was laid to rest in a subsequent discussion with Worthington and he was therefore surprised that it featured as an incident supporting the main charge at his disciplinary hearing. In any event Mr Lucas Coetzee ('Coetzee') an external person, who chaired the internal disciplinary hearing, did not attach weight to this allegation and so no more needs to be said about this particular incident save to say that it may have operated subliminally in the mind of Coetzee in his overall appreciation of appellant's conduct. Nor did Coetzee attach much weight to appellant's apparent rudeness to Lee Kingsma since she did not testify at the internal hearing.

[61] At a luncheon on 22 or 23 August 2003, the appellant was informed by Worthington that he was dissatisfied with a statement that appellant had submitted to the Security Industry Regulating Authority ('SIRA'). He had also furnished the Human Resources Department with a copy of the statement. He was constrained to do this because irregularities had come to the attention of SIRA and rather than risking the loss or withdrawal of his accreditation he thought that he would be proactive and withdraw his registration and resit the test later should this be necessary. This statement dealt with examinations which respondent's personnel had written in order to comply with certain statutory requirements set by SIRA for the registration of security officers. Another person, Attie van der Merwe ('Van der Merwe'), who was also present at the luncheon was in charge of the examinations. Van der Merwe had allowed students to consult textbooks during the examination. Worthington requested him to amend the statement. In the absence of Worthington's evidence the appellant could not help the court as to the respect in which Worthington wanted him to amend his statement. Appellant was not prepared to change the contents of his statement as what he said therein was the truth. Worthington informed the appellant, later at the luncheon, that he did not have a future with the respondent. Coetzee did not take this incident into account at the internal hearing nor did he deem appellant's refusal to amend the statement as an act of insubordination because he concluded that an employee cannot be victimized for making a statement which he by law is required to make. Coetzee made no express ruling whether the filing by the appellant of the statement constituted misconduct because in his view the appellant was

protected by statute. This act may, in my view, have been viewed by Worthington as an act of insubordination.

[62] Another employee, Ben van Rensburg (‘Van Rensburg’), a manager working in the Northern area and who was one rank below the appellant, was charged by the respondent with allegations of passing work to Omega whilst in the employ of respondent. Van der Merwe was to chair the disciplinary hearing. Van der Merwe and the appellant had attended a managerial meeting prior to the disciplinary hearing, at which Van der Merwe remarked that Van Rensburg had been ‘naughty’ and that he was going to chair the Van Rensburg inquiry. The appellant was not specifically told that the content of this discussion was confidential. Further this aspect was not canvassed at the trial by counsel for the respondent. The learned judge in the court *a quo* teased this out from appellant when she questioned the appellant at the trial and appeared to put great store on this as evidence of disloyalty. I might point out that Coetzee, in the internal disciplinary hearing did not regard the representation by the appellant as an offence or misconduct. The appellant, either charitably or uncharitably, inferred that Van der Merwe had prior knowledge of the circumstances on which charges against Van Rensburg were based.

[63] I now advert further to the internal disciplinary hearing of Van Rensburg. On 16 February 2004, Van Rensburg telephoned the appellant and asked him to represent him at the disciplinary enquiry. Appellant agreed. On 17 February 2004 Worthington approached the appellant and discussed the fact that he was going

to represent Van Rensburg. Worthington did not approve of the appellant's decision and asked the appellant to reconsider his decision. On 19 February 2004 the appellant informed Worthington that he had decided to represent Van Rensburg. Worthington once again stated his disapproval.

[64] The appellant enquired as to whether the respondent would be paying for his travelling expenses to Port Elizabeth where the inquiry was going to be held. Appellant approached Van der Merwe to enquire about payment, who in turn undertook to revert to him, but failed to do so. The respondent had no consistent policy about payment for travel expenses to represent a co-employee. The appellant however felt aggrieved that he had not received a response to his request from Van der Merwe. Further, he testified that, as far as he was aware, the respondent on a prior occasion paid for travel expenses occasioned by representation of a co-employee.

[65] The enquiry of Van Rensburg commenced on 23 February 2004, chaired by Van der Merwe. At the outset of the enquiry the appellant asked for Van der Merwe's recusal on the ground that he had already prejudged the matter when he had informed the appellant some time earlier at the aforesaid managers' meeting that Van Rensburg had been naughty. Appellant's request was ignored by Van der Merwe. The enquiry ended on 25 February 2004 whereupon Van Rensburg was found guilty and dismissed. After the enquiry the appellant wrote two letters to the respondent's managing director Mr Douglas Brake ("Brake") wherein he included grievances against Worthington and Van der Merwe. He

stated that Worthington conducted himself in a vindictive and threatening manner. The grievance against Van der Merwe was based on his failure to respond to appellant's enquiry about the travelling costs. This grievance was of no moment and fell away.

[66] On 3 March 2004 the appellant approached Brake and asked him to resolve his grievances. Brake responded on 4 March 2004 and advised the appellant that an investigation would be conducted. The grievance enquiry would be chaired by Mr Eric Louw ("Louw"). This investigation was to deal with the grievance against Worthington. The enquiry was held on 10 March 2004.

[67] Louw recommended that the appellant be charged. Louw made the following recommendations:

> "1. That Mr Worthington be counselled by the HR Director as to the manner and basis upon which to address employees as an endeavour to discuss what he regards as unacceptable behaviour;
>
> 2. That serious consideration be given to charging Mr Seaward for operational requirements in view of his downright stubborn refusal to place the company's interests as a final priority above those of Mr Van Rensburg, and in view of this intolerable (given the circumstances) relationship with the management of Omega."

In the interim Van der Merwe responded in writing to a request by Worthington, wherein he stated that the appellant's decision to

represent Van Rensburg amounted to insubordination. Appellant was asked by Worthington not to represent Van Rensburg but he still did so.

[68] Appellant was suspended pending the outcome of a disciplinary enquiry to be held on 30 March 2004. It is common cause that the hearing was postponed to another date. He was charged with acts of misconduct which I have alluded to above for the period August 2003 to February 2004. Coetzee found the appellant guilty of "an attitude of defiance, obstructive conduct and of creating incompatibility in respondent's objectives and interest and rendering the employment relationship intolerable." Appellant was dismissed on 6 April 2004. He is currently employed by Revert Risk Management Solutions.

[69] In the court *a quo* the appellant gave the following pertinent evidence:

14.1. No clients of Securicor were at the rugby when he decided to go over to see his friends at the Omega box and in any event he considered this matter as having been resolved in his discussions with Worthington;

14.2. He did make regular telephone calls to people from Omega because of his long standing friendship with some of them but at no stage did he disclose any information to them which in any way compromised the interests of Securicor;

14.3. Two weeks before his disciplinary hearing he secured a lucrative contract for respondent with Edcon for R1.2 million a month;

14.4. He was unequivocal about his loyalty to the appellant and at no time had he sought employment with Omega nor was he solicited by them to come and work for them. At the time that he represented Van Rensburg he was not aware that Van Rensburg may have had covert dealings with Omega;

14.4.1. All that he wanted from Van der Merwe was an apology and, as far as he was concerned, there was no breakdown in the relationship.

14.5. Worthington had informed him that he would be "shooting himself in the foot and it would be detrimental to his career" if he represented Van Rensburg (this crucial bit of evidence was not gainsaid).

14.6. In electing to represent Van Rensburg he was doing nothing more than exercising the rights conferred on him by the Act.

14.7. At the enquiry he did not mislead the Chairperson nor in raising the preliminary points did he mean to be obstructive. His primary concern was to ensure that Van Rensburg received a fair and proper hearing.

14.8. His grievances against Worthington and Van der Merwe had an objective factual basis and were made *bona fide*.

[70] The court *a quo* in a judgment based purely on the appellant's evidence, held that appellant was responsible for the breakdown in the trust relationship between himself and the respondent. Its judgment was delivered on 22 June 2006. A written judgment was signed by the judge on 28 August 2006.

Appellant's case on appeal

[71] Before us counsel for the appellant argued that the court *a quo* erred in not properly considering and applying the test propounded in *Kroukam v SA Airlink (Pty) Ltd (*2005) 26 ILJ 2153 (LAC) apropos the nature of the onus with which the appellant was saddled in establishing that his dismissal was automatically unfair. As pointed out earlier no witnesses were called on behalf of the respondent. Thus the evidence of the appellant was to that extent unchallenged. No clear version of the respondent was put to him nor was he discredited in cross-examination as having any ulterior motive in representing Van Rensburg. It was further submitted that the appellant was unfairly criticised by the court below for his conduct in the Van Rensburg hearing. The Court erred in holding either expressly or by implication that the appellant's behaviour at the Van Rensburg enquiry was a valid reason for his dismissal. On the conspectus of evidence the learned Judge erred in her finding that the appellant "was responsible for the breakdown in the trust relationship". She also said: "He bore the onus of establishing prima facie that his dismissal was for representing Van Rensburg and for lodging a grievance against Worthington and Van der Merwe. He has failed to establish that his dismissal was unfair".

[72] Counsel further submitted that the language used by the appellant in his grievance filed with Brake did not *per se* amount to strong language or that an inference could be made that, viewed in its isolation, could lead to the breakdown in the "trust relationship" nor could it justify a finding of misconduct warranting dismissal. Further there was no direct evidence in the court *a quo* that the appellant was disloyal to the appellant. An employee should be allowed to represent a fellow employee without creating the perception of disloyalty towards the employer.

[73] It was the appellant's case that the reason why he was dismissed is that he had represented Van Rensburg at his disciplinary hearing and the grievance he had lodged. Accordingly submitted the appellant's Counsel, his dismissal fell under s187 (1) (d) (i) and (ii) of the Act.

Respondent's case on appeal

[74] Before us respondent's Counsel conceded that the respondent relied on two essential grounds for the contention that the trust relationship between the parties had broken down to such an extent that dismissal was the only appropriate sanction. First that although the appellant was entitled to represent Van Rensburg, it is the manner in which he conducted himself during the Van Rensburg enquiry which led to the conclusion that he was disloyal alternatively the appellant was an author of a situation which led to the breakdown of trust. This is borne out by the extent and the manner of Counsel's cross-examination on this aspect in the court

a quo. Second, that the manner in which the appellant had lodged his grievances against Worthington and Van der Merwe gave the respondent the impression that the appellant was bent on escalating the tension between himself and Worthington and Van der Merwe. Counsel for the respondent submitted further that the appellant has accepted that the *Kroukam* judgment *supra* is good law. The case establishes that there is an onus (in the form of an evidential burden) upon an employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. Respondent's Counsel submitted that the appellant had failed to discharge this evidential burden.

[75] It was argued further that the mere fact that the respondent did not call any witnesses did not mean that the appellant's evidence was uncontested. The court *a quo* was able to consider the appellant's evidence, and was well positioned to make findings of fact and determine the credibility based on the appellant's evidence. It was submitted that this Court should, therefore, be reluctant to interfere with the findings of fact made by the court *a quo.* Counsel for the respondent, in my view correctly, did not persist with the other points raised by it in its answer to the appellant's statement of claim. I accordingly do not propose considering these points since, on the conspectus of the evidence led in the court *a quo*, it cannot be said that the appellant was not advancing the interests of his employer.

[76] It is appropriate to mention under this rubric that the appellant's evidence that at the time when the so-called breakdown of trust between certain senior employees of the respondent and the

appellant allegedly existed, he obtained two very lucrative contracts for the respondent. This evidence was not challenged. Nor was there any evidence that he was conspiring with the employees of Omega to take away the clients of the respondent. There was no concrete evidence that appellant gave Omega information which was detrimental to the respondent or for that matter undermined the respondent's interests. It was put to the appellant that the respondent was concerned as to why appellant, out of 460 odd people, had to represent Van Rensburg especially since there were rumours that Van Rensburg was going over to Omega and was found guilty of insubordination. Appellant testified that, when he was approached, he did not know what van Rensburg's intentions were. He exercised a right which is afforded to him by s4 (1) of Sch. 8 of the Act. In cross-examination appellant stated that his intention in representing Van Rensburg was to ensure that the company followed the correct procedure.

Evaluation

[77] The crux of the appeal therefore is whether the appellant had any onus to discharge at an evidential level and whether he discharged this onus sufficiently to call for a response by the respondent. It is trite that the mere allegation of an automatically unfair dismissal is not sufficient to allow a court to come to the conclusion that the dismissal falls squarely within the confines of s 187(1) of the Act. Section 187 (1) (d) of the Act reads as follows:

"(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is-

…

(d) that the *employee* took action, or indicated an intention to take action, against the employer by-

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;"

The provision of Section 5 also enforces this position. Section 5 of the Act provides:

"5. Protection of employees and persons seeking employment – (1) No person may discriminate against an *employee* for exercising any right conferred by *this Act*.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following –

(a) require an *employee* or a person seeking employment-

(i) not to be a member of a *trade union* or *workplace forum*;

(ii) not to become a member of a *trade union* or *workplace forum*; or

(iii) to give up membership of a *trade union* or *workplace forum*;

(b) prevent an *employee* or a person seeking employment from exercising any right conferred by *this Act* or from participating in any proceedings in terms of *this Act*; or

(c) prejudice an *employee* or a person seeking employment because of past, present or anticipated-

(i) membership of a *trade union* or *workplace forum*;

(ii) participation in forming a *trade union* or federation of *trade unions* or establishing a *workplace forum*;

(iii) participation in the lawful activities of a *trade union*, federation of *trade unions* or *workplace forum*;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an *employee* to do;

(v) disclosure of information that the *employee* is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by *this Act*; or

(vii) participation in any proceedings in terms of *this Act*."

[78] Although both Zondo JP and Davis AJA in the case of *Kroukam supra* concluded that the employee's dismissal had been automatically unfair, they adopted different approaches to the manner in which automatically unfair dismissals should be considered by the court. In Zondo JP's view it had not been necessary to consider the issue of onus, as there was sufficient evidence to prove that the employee's dismissal had been principally due to the active role he played in union matters. Davis AJA at para 28 was of the view that s187 places an:

> "evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s187 for constituting an automatically unfair dismissal."

[79] Did the appellant in this matter present sufficient evidence to the court to cast doubt on the reason for the dismissal put forward by the employer? Alternatively, in terms of Davis AJA's decision, did the appellant raise a credible possibility that an automatically unfair dismissal had taken place? Was the court *a quo* correct in postulating a further requirement that the appellant was required to make out a case at a *prima facie* level to put the respondent on its defence?

[80] I might in passing mention that the thrust of the respondent's case was that the appellant's behaviour verged on insubordination and

further that he was bent on increasing tension in the workplace by lodging unfounded grievances. An employee can only be deemed to be insubordinate if he refuses to obey a lawful and reasonable instruction. Worthington's request that the appellant amend the statement which he had filed with SIRA was by all accounts an unreasonable request and as was correctly found by Coetzee in the internal enquiry, the appellant was bound by statute to do what he did. Moreover, Section 5 (2) (c) (v) protects the appellant. It was never the case of the respondent that the appellant in his correspondence with SIRA had made any false representations; nor was it reasonable of Worthington to request that the appellant not represent Van Rensburg at the latter's disciplinary enquiry since this is a right which the appellant enjoys in terms of the Act. This request was also unreasonable and one which the appellant could ignore with impunity.

[81] It is perhaps opportune to consider the role of an employee representative at a disciplinary enquiry. The same exacting professional standard expected of a lawyer is not expected of an employee representative. Be that as it may an employee representative besides representing the employee at a disciplinary enquiry is required to assist the chairperson of the enquiry in arriving at a correct decision. It is the representative's function to present the case of the employee vigorously, efficiently and independently. Independence however does not mean rudeness or impertinence. He must act in good faith, honestly and with appropriate courtesy. Courtesy, does not mean sycophancy, and where the necessity of the case requires, a representative should press upon a point and not give it up merely because of an

unfavourable expression of opinion by the chairperson. An employee representative is not required to have an indepth knowledge of the law and to that end may raise preliminary points which a seasoned lawyer will not take.

[82] Counsel for the respondent was constrained to admit that at no time in his representation of Van Rensburg did the appellant behave in a dishonest or improper manner. Counsel's criticism of the manner in which the defence was conducted related in the main to the failure of the appellant to convince Van Rensburg to plead guilty in the face of evidence which was overwhelming. This criticism has no merit since a representative's duty is to comply with instructions of the employee he is representing provided that in carrying out his instructions he does not mislead the tribunal. A representative of the employee is in the position of a lawyer. He is obliged to put a version which is given to him and to represent the employee to the best of his ability even if the representation is robust. I am of the view that on the evidence before us the appellant did not misconduct himself in representing Van Rensburg.

[83] Apropos the grievances lodged by the appellant against Worthington and Van der Merwe. An employee is entitled to lodge grievances against a co-employee and it is the duty of management to investigate the same. It is common cause that on the 25 February 2004 the appellant lodged a grievance against Worthington concerning the latter's alleged "vindictive and threatening manner in which he attempted to convince me not to represent Mr Ben Van Rensburg at his disciplinary enquiry". The appellant perhaps used

emotive language or hyperboles when he so stated but this is understandable since Worthington had told him on two discrete prior occasions that he had no career prospects with the respondent. As the evidence showed he was overlooked for a position which became vacant despite the fact that the individual to whom this position was offered turned it down. The only reasonable inference which can be drawn in the absence of an explanation from respondent is that Worthington's threat had come to pass. In my view the grievance albeit in strong language had a legitimate basis. Similar considerations apply to the further grievance lodged by the applicant against Worthington. This is further borne out by the recommendation made by Mr E H Louw who presided over the enquiry to consider the grievance lodged by the appellant against Worthington and Van der Merwe. Louw recommended that Worthington be counselled as to the manner in which he addressed co-employees. The grievance against Van der Merwe was petty in nature and did not feature in any great measure in the misconduct attributed to the appellant. I am thus of the view that the Appellant did not conduct himself in any way so as to justify his dismissal. Thus the two grounds which counsel for the respondent argued before us have no merit. Accordingly, the respondent had no substantive ground to dismiss him since in an analysis of the evidence presented before the learned Judge and the internal enquiry the respondent could point to no crystalline moment when the appellant misconducted himself to warrant dismissal other than what comes to the fore on a closer analysis and that is the failure of the appellant to obey Worthington's unreasonable request not to represent Van Rensburg.

[84] The enquiry does not end there. Did the appellant place sufficient evidence before the learned judge to raise a credible possibility that his dismissal was automatically unfair in terms of s187? Before considering this we were reminded by counsel that we, sitting as an appellate court, should be reluctant to disturb the credibility findings of the trial Judge. This is a hallowed principle and was well articulated by Holmes JA in *S v Robinson & Others* 1968 (1) SA 666 (AD) at 675 G-H:

> "A Court of appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial Court's impressions of them. Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial Judge's appraisal of oral testimony, but only in exceptional cases as aptly summarised in a Privy Council decision quoted in *Parkes* v *Parkes*, 1921 A.D 69 at p.77:
>
> 'Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."

[85] The learned judge made no express credibility findings other than stating that "the appellant's evidence shifted between admitting and denying that there was breakdown in trust". In my view the

learned judge misdirected herself in that she did not appreciate the role of an employee representative at a disciplinary hearing. She was critical of the appellant having raised *in limine* points which according to her had no merit. An employee representative is entitled to raise any points including *in limine* points in a disciplinary enquiry to protect his "client's" interests. He is even entitled to raise bad points provided he does so *bona fide* and not to mislead the tribunal. He is not restricted to raising only good points. Equally his knowledge that Van der Merwe may have been biased, albeit such knowledge was acquired whilst he was attending a managerial meeting, was no bar to him asking for Van der Merwe's recusal. Management should have known better than to appoint such a person to chair an enquiry. Alternatively as soon as a request for recusal was made, it should have been given due consideration. The learned judge's finding that the appellant was responsible for the breakdown of the relationship cannot stand.

[86] The appellant in the court *a quo* in my view gave, sufficient evidence to establish that there was a credible possibility that he was dismissed for representing Van Ransburg and lodging the complaint against Worthington and Van der Merwe. His dismissal therefore constituted an automatically unfair dismissal as contemplated in the provisions of s187 (1) (d) (i) and /or (ii) of the Act. This conclusion is consistent with the evidence given by the appellant and is further consistent with the probabilities. One can arrive at no other conclusion that this was the proximate cause for his dismissal even if it operated subliminally. Once the appellant had gone past this threshold of the evidential burden, it was for the respondent to show that his dismissal was fair. The respondent

failed to do this. In my view under the circumstances it would be otiose to consider whether the appellant had to "*prima facie*" establish that his dismissal was automatically fair. The learned judge was bound to apply the test postulated by this court and not 'muddy the waters' by introducing a further test.

Relief

[87] The appellant does not seek reinstatement. Having made the finding that the appellant's dismissal was automatically unfair the issue of what compensation the appellant should receive arises. The relevant provisions of s 194 read as follows:

> "(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of dismissal.
>
> (2) …
>
> (3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*."

[88] The appellant in his statement of case sought:

> "Compensation equivalent to 24 months, alternatively 12 months remuneration calculated at the employee's rate of remuneration on the date of his dismissal as contemplated in the provisions of section 194 of the Act"

It is common cause that the appellant was unemployed for a period of approximately five months. In that time he earned no more than about R15, 000.00 (fifteen thousand rand) doing part-time consultancy. Counsel for the appellant argued that the appellant should receive compensation equivalent to 24 months remuneration. In the absence of any evidence presented by the respondent in the court below the only conclusion to which I can come is that the conduct of the respondent was offensive and repugnant to what the Act envisages for the workplace.

I see no reason why he should not be awarded compensation for 24 months.

[89] With regards to costs, I am of the view that the appellant has been substantially successful. In my view the requirements of law and fairness dictate that the respondent pays the appellant's cost, such cost to include all costs of the trial in the court below including any costs which were reserved.

[90] In the circumstances, the appeal succeeds and the following order is made;

1. The order of Pillay J of 28 August 2006 is set aside and replaced with the following order:

"a. The dismissal of the appellant on 6 April 2006 is declared to be automatically unfair in terms of s187 (1) (d) of the Act.

b. The respondent is ordered to pay compensation to the appellant equivalent to 24 months' remuneration calculated at the rate of appellant's rate of remuneration on the date of dismissal.

c. Respondent is ordered to pay costs such costs to include costs occasioned by an adjournment on 27 February 2006."

2. The respondent is further ordered to pay all costs occasioned by the application for leave to appeal before the court *a quo* as well as costs for the appellant's petition and the appeal.

Patel JA

Appearances

For the Appellant Adv EJS Van Graan
Instructed by Fairbridges

For the Respondent Adv P Belger
Instructed by Edward Nathan Sonnenbergs

Date of judgment: 28 August 2009